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Case Class:	Civil
Court:	High Court at Busia
Case Action:	Ruling
Judge:	Nicholas Randa Owano Ombija
Citation:	WASHINGTON A. OKWABA & ANOTHER v ESTATE OF EDWARD PAMBA BWONGI (DECEASED) [2006] eKLR
Advocates:	-
Case Summary:	..
Court Division:	-
History Magistrates:	-
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Docket Number:	-
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Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUSIA**

**Civil Suit 20 of 2005**

**WASHINGTON A. OKWABA.....1<sup>ST</sup> PLAINTIFF**  
**WASIA OLUMA.....2<sup>ND</sup> PLAINTIFF**

**VS**

**THE ESTATE OF**

**EDWARD PAMBA BWONGI (DECEASED).....1<sup>ST</sup> DEFENDANT**  
**HANNINGTON OUMA PAMBA.....2<sup>ND</sup> DEFENDANT**  
**DIXON BARASA PAMBA.....3<sup>RD</sup> DEFENDANT**  
**WILBERFORCE WANYAMA PAMBA.....4<sup>TH</sup> DEFENDANT**  
**JOSEPHAT WANYAMA PAMBA.....5<sup>TH</sup> DEFENDANT**  
**PATRICK OBUTE PAMBA.....6<sup>TH</sup> DEFENDANT**  
**JOSEPH OKOCHI PAMBA.....7<sup>TH</sup> DEFENDANT**  
**JUDITH NAKOLI PAMBA.....8<sup>TH</sup> DEFENDANT**  
**HUMPFREY MALOBA PAMBA.....9<sup>TH</sup> DEFENDANT**  
**WINFRED NABWIRE PAMBA.....10<sup>TH</sup> DEFENDANT**  
**JOHN GEOFFREY PAMBA.....11<sup>TH</sup> DEFENDANT**

**RULING**

On 27<sup>th</sup> February 2006, I heard arguments from the respective counsels and at the close of those arguments, I pronounced a ruling dismissing the application dated 11<sup>th</sup> July 2005. I reserved my reasons which I now give. But first the background. By an application by way of Chamber Summons dated 11<sup>th</sup> July 2005 pursuant to the provisions of Order VI Rule 13 (1) and Order XXXV rule 1 of the Civil procedure rules, the applicant sought for orders that:

- a) The plaintiffs’ suit in its entirety against the defendants be struck out with costs.

- b) Summary Judgment be entered against the Plaintiffs as prayed in the counter-claim by the Defendants
- c) Costs of this application be borne by the Plaintiffs.

The application is based on the grounds:

- i) No suit can lie against the named 1<sup>st</sup> Defendant as sued, and as no such Estate exists and no one has ever taken out letters of administration to the said Estate.
- ii) The 3<sup>rd</sup>, 6<sup>th</sup> and 9<sup>th</sup> Defendants as named are incapable of being sued as they are deceased and a fact known to the Plaintiff prior to filing this suit.
- iii) The plaintiffs' suit as pleaded does not disclose any or reasonable cause of action against any of the Defendants herein.
- iv) The Plaintiffs' allegations of trust created between them and the deceased, Edward Pamba Bwongi, is alleged in a vacuum, is a total fabrication and afterthought pleaded merely for purposes of filing this suit to defeat their eviction as trespassers on the original suit land herein.
- v) The plaintiffs have never alleged or claimed any trust in previous informal and formal court proceedings between them and the 2<sup>nd</sup> defendant prior to this suit over the original suit land herein.
- vi) All other causes of action of the plaintiffs against the defendants are founded upon the said non-existent trust alleged between the plaintiffs and the defendants' deceased father and hence can not stand on, and or have no existence of their own as a basis of any prayers or reliefs herein.
- vii) The defendants' acquisition of titles to the various subdivision parcels of the original suit land herein was absolutely procedural; in accordance with the law and based on legally valid documents.
- viii) The plaintiffs' suit on the basis of grounds (i) to (vii) above is an abuse of court Process; mischievous scandalous, and vexacious; and will delay a fair and quick trial herein.
- ix) The plaintiffs have had no registrable interest, claim, title and right over the original suit land herein and are hence trespassers whose invitation to stay expired and should be evicted there from.

The application is grounded upon the annexed affidavit of Prof. Hannington Ouma Pamba sworn on the 11<sup>th</sup> July 2005. At the hearing Mr. Omondi for the plaintiff's respondent raised a preliminary objection that the application is faulty to the extent that it does not show under what ambit of Order VI Rule 13(1) it is made under hence the respondent is prejudiced thereby.

Order VI Rule 13 provides:

*“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the that:-*

- (a) it discloses no reasonable cause of action or defence; or*
- (b) it is scandalous, frivolous or vexatious; or*
- (c) it may prejudice, embarrass or delay the fair trial of the action; or*

(d) *it is otherwise an abuse of the process of the court,*

(2) *No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.*

(3) *So far as applicable this rule shall apply to an originating summons and a petition as if the summons or petition were a pleading.”*

It was argued for the respondent that the applicant has not shown under which ambit of order VI Rule 13 he has brought the application so that the respondent is prejudiced.

The applicant when confronted with this argument, sought to amend the application orally in court. He did not show me his authority for such amendment. Eventually he exhorted me to strike out the application instead of dismissing it.

I take the view that an applicant that comes under Order VI Rule 1 (a) need not file an affidavit in support of the application, while the applicant comes under Order VI Rule 13 1 (b) and (c) and (d) require an affidavit in support.

The application as drawn does not show under which ambit of Order VI Rule 13 is brought. Accordingly the application is not properly before me. I agree that the respondent is prejudiced thereby. Accordingly, I strike it out.

In passing, I wish to mention that the issue in the relief sought in trust regarding land. That cannot be the subject of summary judgment which presupposes a liquidated demand. This aspect of prayer is also manifestly wrong. I also strike out the application as it relates to this limb. It is so ordered.

DATED & DELIVERED at Bungoma this 22nd day of December, 2006.

N.R.O. OMBIJA

JUDGE



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